

⁴ Letter to Mr. Robert Thompson, Esq., (MMB, Mar. 30, 2001) ("Staff Decision").

otherwise entitled to protection under the Commission's rules, the staff modified KCIX(FM)'s license without invoking the "protest" provisions of Section 316 of the Communications Act of 1934, as amended (the "Act").⁵ Accordingly, on April 13, 2004, the staff rescinded the grant of the Application, retained it and the petition for reconsideration in pending status ("Staff Action"), and accorded Citicasters its protest rights under Section 316 of the Act by requesting Citicasters to show cause why the modification application should not be granted.⁶ On May 12, 2004, Citicasters filed its "Response to Order to Show Cause."⁷

Pleadings

3. *RSM Waiver Requests.* Under Section 73.215(e) of the Commission's rules, the proposed KBNH(FM) facilities would be 8.1 kilometers short-spaced to second-adjacent channel class C station KCIX(FM). In support of its section 73.215(e) waiver request, RSM states that its original transmitter site is "unavailable" because of environmental issues raised by the Bureau of Land Management ("BLM"). RSM submits that all of the area acceptable to BLM for use as a transmitter site is short-spaced to KCIX(FM), and that it selected a site that would minimize the short spacing to the greatest extent possible. RSM states that the "practical effect" of the short-spacing is *de minimis* in that the proposed facility would cause interference to only nine persons within the KCIX(FM) 60 dBu service area, equivalent to only 0.0024 percent of the total population within KCIX(FM)'s service area, and correspondingly, KCIX(FM) would cause interference to only 186 persons within KBNH(FM)'s proposed 60 dBu service area, equivalent to only 0.054 percent of the total population.⁸

⁵ Citicasters submitted with the Reply pleading an Engineering Statement and studies purporting to show that operating KBNH(FM) with a directional antenna would ameliorate the interference relationship between KBNH(FM) and KCIX(FM) and would cause a small decrease in "gray area" coverage (see Note 9 *infra*) involving no loss of population. 47 C.F.R. § 1.45(c) prohibits petitioners from raising new matters in reply pleadings. However, we waived that provision here due to the importance of the statutory issue raised.

47 U.S.C. § 316 (a)(1), in pertinent part, provides that:

Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity... No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefore, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification.

This provision applies to both "direct" and, as here, "indirect" modification of station licenses. *Western Broadcasting Company v. FCC*, 674 F.2d 44, 49 (D.C. Cir. 1982).

⁶ See *Memorandum Opinion & Order, R&S Media*, 19 FCC Rcd 6300 (MB 2004) ("Order to Show Cause"). The staff also dismissed without prejudice RSM's pending license application and PTA request.

⁷ RSM filed a "Reply to Response to Order to Show Cause" on June 14, 2004.

⁸ Specifically, RSM states that the KBNH(FM) facility will cause interference to nine persons within the KCIX(FM) licensed service 60 dBu service contour, encompassing an area of 195.3 square kilometers. This is equivalent to 0.0024 percent of the total population and 0.74 percent of the total land area within the KCIX(FM) service contour; and that KCIX(FM) will cause actual interference within the proposed KBNH(FM) 60 dBu service contour to eight census blocks containing a combined population of 186 persons. The actual interference area encompasses 55.6 square kilometers. This amounts to 0.054 percent of the total population and 0.34 percent of the total land area within the proposed KBNH(FM) service area.

4. The KBNH(FM) proposal would result in prohibited Section 73.215(a) contour overlaps with KCIX(FM). In support of its section 73.215(a) waiver request, RSM states that facility would provide a first service (white area) to 864 persons living within a 4,649.7 square kilometer area and a second service (gray area) to 208 persons living within a 1,541.2 square kilometer area.⁹ Furthermore, RSM states that KBNH(FM) would provide a new service to a total of 3,555 persons who are now underserved, i.e., receive fewer than five full time aural broadcast services; would result in predicted interference to only 186 persons in a 345,000-person service area; would meet the environmental demands of the BLM; and would bring the first local service to Homedale.

5. *Response to Order to Show Cause ("Response").*¹⁰ In its Response, Citicasters states that the "obvious solution" to this matter is to grant a construction permit subject to the specification of a directional antenna, which would: (1) allow KBNH(FM) to more than adequately place a city-grade signal over Homedale; (2) essentially reduce to zero the population subject to interference within KCIX(FM)'s protected contour; (3) eliminate the interference from KCIX(FM) that would be received by KBNH(FM); (4) allow KBNH(FM) to provide the same service to currently white areas as would be provided by the omnidirectional facilities specified in the Application; and (5) only marginally reduce the additional service to gray areas--- all of which are currently unpopulated.¹¹ In sum, according to Citicasters, "with a directional antenna at the site designated by RSM, prohibited overlap to KCIX(FM) will not be 'completely avoided,' but prohibited overlap to KBNH(FM) *would* be completely avoided, and the prohibited overlap to KCIX(FM) would be substantially diminished to the point that essentially no population would be affected."¹²

6. With respect to RSM's request for waiver of Section 73.215(e), Citicasters maintains that, contrary to RSM's threshold showing, fully-spaced sites are available. Citicasters states that it had previously identified five suitable, privately owned sites that are fully-spaced to KCIX(FM) that would provide the requisite principal community coverage to Homedale. In support of these contentions, Citicasters relies on contour studies that use an alternate signal propagation methodology, which it claims is expressly authorized by 47 C.F.R. section 73.313(e).¹³

7. Regarding RSM's Section 73.215(a) waiver request, Citicasters asserts that the factors RSM presents in support of its waiver request are inaccurate. In its petition for reconsideration, Citicasters challenges RSM's calculations and asserts that RSM presents "inaccurately low figures" relating to the populations and areas subject to prohibited contour overlap and the size and population of the white area.

⁹ "White area" is an area over which no station currently provides fulltime coverage within its protected service contour, and "gray" area, where the inhabitants are within the protected service contour of only one station.

¹⁰ Citicasters incorporates by reference the engineering statements appended to its May 4, 2001, Petition for Reconsideration and June 11, 2001, Reply to Opposition to Petition for Reconsideration.

¹¹ Citicasters states that if KBNH(FM) used a directional antenna, the white area service provided by KBNH(FM) would not be changed or reduced, and that the gray area provided KBNH(FM) would be reduced by only 54 sq. km, which according to the 1990 and 2000 Census, is unpopulated. This represents a loss of only 4.6% of the area of the 1,168 sq. km gray area, and no loss of gray area service population. Citicasters maintains that the directional antenna would have a 13 dB power reduction at 50 degrees through 60 degrees True, returning to full power at 125 degrees and 345 degrees True. *Response, Engineering Statement.*

¹² Response at 5 (emphasis in original).

¹³ In its Response, Citicasters indicates that, should the application be granted conditioned upon the installation of directional facilities as specified in its June 11, 2001 Reply pleading, it "would not be inclined to pursue further the issue of the availability to RSM of alternative sites." Response at 6.

Citicasters submits that the amount of contour overlap is "significantly greater" than represented by RSM and that the number of persons who would receive a first aural service from the KBNH(FM) proposal is substantially fewer than specified in the Application.¹⁴ Citicasters' states that operation of KBNH(FM) from one of the fully spaced sites would provide greater white area service than that proposed in the subject application.

Discussion

8. Under Section 316 of the Act and Section 1.87 of the Commission's rules the Commission may modify any license if such action will promote the public interest, convenience and necessity.¹⁵ Further, an applicant seeking a waiver of a Commission rule must plead with particularity the facts and circumstances that warrant grant of the waiver.¹⁶ In turn, we have afforded the waiver requests and related materials the "hard look" called for under *WAIT Radio v. FCC*.¹⁷

9. *Section 73.215(e) Waiver Request.* Section 73.207 requires that KBNH(FM) and KCIX(FM), be separated by at least 105 km. As a Section 73.215 proposal, the minimum spacing is 99 km.¹⁸ The separation proposed by KBNH(FM) would be 90.9 km. Thus, a waiver of the 8.1 km-short-spacing is necessary for the application to be granted. Section 73.215 waivers are considered on a case-by-case basis.¹⁹ In *ECI License Company, L.P. (WYUU)*,²⁰ the Commission explained that Section 73.215(e) waiver requests are based on Section 73.207, not Section 73.215(e) spacing requirements. This is because the Section 73.215(e) table already incorporates a measure of short-spacing, which prior to the adoption of the contour protection rules in 1989, would itself have required grant of a spacing waiver. We must therefore compare the present spacing waiver request against other comparable spacing waiver decisions involving short-spacings of 14.1 km (8.76 miles) in magnitude.

10. Section 73.215(e) waiver requests are evaluated on the basis of the following criteria:²¹

- (1) The present site is no longer available;
- (2) Suitable non-short-spaced sites are unavailable; and
- (3) The site selected is the least short-paced of all available sites.

¹⁴ Citicasters states that operation of KBNH(FM) from one of the fully spaced sites would provide greater white area service than that proposed in the subject application.

¹⁵ See 47 U.S.C. § 316; 47 C.F.R. § 1.87.

¹⁶ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644 (D.C. Cir. 1968)

¹⁷ 418 F.2d 1153 (D.C. Cir. 1969)

¹⁸ The minimum spacing required by Section 73.215(e) was recently relaxed to 99 km by *Streamlining of Radio Technical Rules in Parts 73 and 74, Second Report and Order*, in MM Docket 98-93, 15 FCC Rcd 21649 (2000).

¹⁹ *Streamlining of Radio Technical Rules in Parts 73 and 74, Second Report and Order*, 15 FCC Rcd 21649, 21654 (2000).

²⁰ See *ECI License Company, L.P. (WYUU)*, 11 FCC Rcd 3545, 3546 (1996) at n. 4, *appeal den.*, Case No. 96-1122, 106 F.3d 442 (D.C. Cir. Dec. 26, 1996). See also *Greater Media Radio Company, Inc. (WPLY)*, 15 FCC Rcd 7090 (1999), *recon. denied*, 15 FCC Rcd 20485 (2000); *Letter to ECI License Company, Inc. (KNRK)*, 11 FCC Rcd 1797, 1799 n. 17 (1996).

²¹ *Greater Media Radio Company, Inc (WPLY)*, 15 FCC Rcd at 7095.

The applicant is also required to show that grant of the short-spacing waiver would be in the public interest.

11. *The present site is no longer available.* In the present case, RSM has submitted detailed declarations that demonstrate that its original construction permit site cannot be used. The BLM, which has jurisdiction over the construction permit site location, has clearly stated that the site is not available for tower construction.

12. *Suitable non-short-spaced sites are not available; the site is the least-short-spaced site.* RSM, in its application and supplements thereto, has provided ample information that establishes that there are no other available non-short-spaced sites or lesser short-spaced-sites. RSM has spent more than six months evaluating various sites and consulting with BLM officials, including Mr. Sheldon Saxton, Realty Specialist for the BLM. The consultation process with BLM has been so exhaustive and intensive that RSM has agreed to reimburse the BLM for staff costs incurred on this project. Sites at greater separations than proposed here were found to fall within the Owyhee Reservoir Basin, or in state parklands, which lie behind a ridge that would prevent line-of-sight to the community of Homedale. Other sites that the BLM indicated would be acceptable are no less short-spaced to KCIX(FM). The applicant has provided terrain studies from the city center radially outward to show that a tall tower would be required to achieve line-of-sight to Homedale from transmitter sites located further west (and thus, more fully spaced) than the proposed site. However, the BLM has expressly stated that it would not permit a tower in excess of 200 feet to be constructed, effectively preventing KBNH(FM) from serving Homedale with a 70 dBu signal from these more remote sites to the west of Homedale.

13. RSM has also investigated the relatively few scattered small parcels of non-BLM land in the properly spaced areas (either under Section 73.207 or Section 73.215(e)). Terrain profiles provided with the application as supplemented show that such locations would require a tower structure in excess of 1000 feet in height to achieve line-of-sight to Homedale. However, BLM has indicated that it would "emphatically" object to any proposal for a tower in excess of 200 feet in height on private land adjacent to BLM land. This leaves the proposed site as the only possible site. The applicant has provided a letter from Mr. Roy J. Masinton, Malheur Field Office Manager, BLM dated January 10, 2000, stating that RSM and the BLM have entered into an agreement for use of the proposed site for a radio tower. The proposed transmitter site will have line-of-sight to the community of license, Homedale.

14. Citicasters' assertion that it has identified five potential fully spaced sites is not persuasive. It appears that the sites identified by Citicasters are unsuitable in that they are mountain top sites located in an inaccessible rugged wilderness area devoid of adequate roads and electrical power. Citicasters indicates in its Response that "assumed inconveniences or undocumented obstacles" such as those claimed by RSM "do not meet the burden necessary for an applicant requesting waiver of Section 73.215(a) and 73.215(e)."²² Citicasters cites no authority for this proposition and, in fact, the Commission has considered these factors in determining the availability and suitability of potential sites.²³

²² Response at 6 n. 18.

²³ See *St. Maries, Idaho and Spokane, Washington*, 14 FCC Rcd 17012 (MB 1999) (the suitability of a site relates to a site's feasibility, which includes availability of electrical power and road access); *Topsail Beach and Wilmington, North Carolina*, 3 FCC Rcd 159 (MMB 1988), *reconsideration granted*, 3 FCC Rcd 3129 (1988) (it is unfair to require a station to undertake extreme measures, in terms of difficulty and expense, to locate a transmitter at an unfeasible site in order to achieve a proscribed site restriction); *Cuban-American Limited*, 2 FCC Rcd 3264 (1987), *subsequent history omitted* (circumstances that are extremely hazardous, expensive or disruptive can render a transmitter site unsuitable despite evidence of technical feasibility and possibility).

We reject Citicasters' attempt to downplay the problems associated with each of its five purported antenna locations, and thus we reject Citicasters' proffer of fully spaced sites from which KBNH(FM) could provide a principal community contour to Homedale. We find the site proposed in the subject application to be the least-short-spaced available site.

15. RSM's showing is similar to that made in *Beasley Broadcasting of Philadelphia (WXTU)*,²⁴ in which a Philadelphia station was granted a 12.2-km (7.6-mile) spacing waiver with respect to Section 73.207 to overcome patently defective coverage in its community of license. There, as here, the applicant undertook a thorough search for a non-short-spaced or lesser-short-spaced transmitter site, and also provided radial data to demonstrate line-of-sight problems in locating an acceptable transmitter site.²⁵ In the present case, the applicant has clearly demonstrated that absent grant of a spacing waiver, no alternative site is available that will permit line-of-sight to Homedale.

16. We also note that a reduction in station class to Class C0 or Class C1 would not reduce the spacing deficiency, since the minimum spacings required to KCIX(FM) under Section 73.207 are identical with the spacings for these lower classes (105 km). Section 73.215(e) likewise provides no additional relief since the required minimum spacing under the contour protection rule for Class C, C0, and C1 stations is 99 km.

17. *Section 73.215(a) Waiver Request.* RSM also requests a waiver of Section 73.215(a) to allow KBNH(FM) to cause prohibited contour overlap to and receive prohibited contour overlap from KCIX(FM). Specifically, the 100 dB μ interfering contour of KBNH(FM) would cause prohibited contour overlap within the 60 dBu service contour of KCIX(FM), in a 195.3 square kilometer area, containing 9 persons. Conversely, the 100 dB μ interfering contour of KCIX(FM) would cause prohibited contour overlap within the proposed 60 dB μ service contour of KBNH(FM), affecting 186 persons in a 55.6 square kilometer area.

18. RSM indicates that it has investigated the use of a directional antenna through which the prohibited contour overlap received by KBNH(FM) from KCIX(FM) could be reduced or eliminated. This would require a reduction in power from 100 kW to 53 kW toward the 100 dB μ interfering contour of KCIX(FM). According to calculations submitted in a supplement to the application, this would have the minimal effect of reducing the population that would potentially receive interference to KCIX(FM) from 9 persons to 1 person, and would diminish coverage of "white" and "gray" service areas which would receive service by a nondirectional 100 kW ERP operation. No amount of power reduction can completely eliminate the prohibited overlap caused to KCIX(FM), because the transmitter site proposed by RSM lies within the 60 dB μ contour of KCIX(FM). Citicasters contends that the *Order to Show Cause* erroneously concluded that "a power reduction toward KCIX(FM) by use of a directional antenna would have a minimal effect on the area and population that would receive prohibited overlap from KCIX(FM), but would substantially diminish coverage of white and gray areas that would receive service from KBNH(FM)'s 100-kW operation."²⁶ Rather, Citicasters asserts that a directional antenna would completely eliminate the area and population receiving prohibited overlap from KCIX(FM).²⁷ We agree, but conclude that this minor error in the *Order to Show Cause* does not require a different result. Use of a directional antenna, as observed in the *Order to Show Cause* and reiterated here, would not eliminate

²⁴ 100 F.C.C.2d 106 (1985).

²⁵ See *Megamedia, supra*, (12.9-km (8-mile) short-spacing granted by the Commission after exhaustive search for site to remedy excessive radiofrequency emissions).

²⁶ *Order to Show Cause* at 6.

²⁷ Citicasters Response at 4-5.

our primary concern: that the proposal will *cause* prohibited overlap to KCIX(FM). That problem cannot be eliminated by downgrade or directional antenna. Therefore, use of either of those approaches would only serve to decrease the coverage benefits derived from the KBNH(FM) proposal.

19. Additionally, the exhibits provided by RSM show that approximately one-third of the area within the proposed KBNH(FM) 60 dB μ contour, generally to the west of the proposed transmitter site, consists of "white area," over which no station currently provides fulltime coverage. A significant additional portion of the KBNH(FM) proposed 60 dB μ service area consists of "gray" area, where the inhabitants are within the protected service contour of only one station. The proposed 60 dB μ contour also would encompass portions of U.S. Highways 20 and 26 west of Vale, Oregon, that presently receive no radio service. While the populations of these areas are only 864 persons and 208 persons respectively, the areas themselves are extensive. Outside of Alaska, large white areas in the United States are rare. In the past, we have granted rule waivers where new service would be provided to large white areas.²⁸

20. In addition to covering a large white area, KBNH(FM) would provide a first local service to Homedale, Idaho and provide service to approximately 345,000 persons within its 60 dB μ contour. Finally, grant of the requested waivers would support BLM's efforts to protect the "environmentally sensitive" Owyhee Reservoir Basin.

21. Citicasters challenges RSM's calculations and asserts that RSM presents "inaccurately low figures" relating to the populations and areas subject to prohibited contour overlap and the size and population of the white area.²⁹ Citicasters submits that the amount of contour overlap is "significantly greater" than represented by RSM and that the number of persons who would receive a first aural service from the KBNH(FM) proposal is substantially fewer than specified in the application.³⁰

22. For the reasons stated above, we do not find these arguments persuasive. There is no available and suitable site from which prohibited contour overlap with KCIX-FM could be completely avoided. Also as noted above, the use of a directional antenna or power reduction would not avoid the creation of new predicted overlap with KCIX(FM). This is a significant factor in considering RSM's waiver request.³¹ Additionally, a reduction in KBNH(FM)'s power toward KCIX(FM) by use of a

²⁸ For example, waiver of Section 73.211(b) was granted in 1996 to then-KXVR-FM, Mountain Pass, CA in construction permit BPH-820714AB to enable that station to cover a very large white area in the California desert. There, as here, most of the available sites were controlled by the Southern California Desert Conservancy or the Bureau of Land Management. The BLM approved the KXVR-FM site after six months of negotiations, prior to the filing of that application.

²⁹ Citicasters indicates that RSM submitted its figures not based on the contour-overlap methodology, but instead using the "undesired-to-desired" signal contour ratio methodology; Citicasters claims that this methodology has never been employed in Section 73.215 short-spacing cases. Based on the "correct application of the contour overlap method used in Section 73.215 short-spacing cases," writes Citicasters, KBNH(FM) will cause overlap of 315 square kilometers including 90 persons within the KCIX(FM) 1 mV/m contour, and KBNH(FM) will receive overlap of 142 square kilometers containing 7,023 persons within its 1 mV/m contour. Petition for Reconsideration, Engineering Statement, at 11. Additionally, Citicasters argues that RSM "presents an inaccurate picture of the size and population of the white area to which grant of the KBNH(FM) application will provide the first aural service." Citicasters claims that KBNH(FM) will provide a first aural service to only 145 persons in a 3,439-square-kilometer area, which represents only 0.04 percent of the population within the KBNH(FM) 1 mV/M contour. Petition for Reconsideration, Engineering Statement, at 11-12.

³⁰ Citicasters states that operation of KBNH(FM) from one of the fully spaced sites would provide greater white area service than that proposed in the subject application.

³¹ See *Greater Media supra*, 15 FCC Rcd at 7099, ¶ 18.

directional antenna would have minimal effect on the area and population that would receive prohibited overlap from KCIX(FM), but it would substantially diminish coverage of the white and gray areas that would receive service from KBNH(FM)'s 100-kW operation.

23. RSM's exhibits clearly indicate that it undertook an initial analysis of overlap impact with respect KCIX(FM) under Section 73.215 using the standard prediction methodology in Section 73.313 of the Commission's rule. It also augmented that analysis, as is often done by waiver applicants, with supplementary data using the desired-to-undesired signal contour ratio methodology. The differences between the areas and populations in the overlap and white areas derived from the standard methodology and those determined by use of the contour ratio method are neither unexpected nor so great as to alter our conclusion that grant of the KBNH(FM) application would serve the public interest.

Conclusions/Actions

24. Based upon the record in this matter, pursuant to Section 316 of the Communications Act of 1934, as amended, we conclude that it would be in the public interest to modify Citicasters' license for Station KCIX(FM) by granting the R&S Media application for modification of construction permit.

25. Given the information presented, we find that the RSM has fully established that there are no non-short-spaced or lesser-short-spaced sites available to KBNH(FM), and that the specified site is the least short-spaced feasible site. Thus, waiver of section 73.215(e) is warranted. Moreover, having reviewed the exhibits provided by RSM, waiver of the contour overlap provisions of Section 73.215(a) is warranted on the exceptional facts of this case. As noted above, no other transmitter sites are available at which prohibited contour overlap could be completely avoided. We agree that requiring KBNH(FM) to operate directionally would provide minimal protection to very few persons while depriving a large "white" area of a first new service.³² These factors support grant of the requested 73.215(a) contour overlap waiver.

26. In conclusion, RSM has demonstrated that unique and compelling factors to warrant grant of the requested waivers of 47 C.F.R. Section 73.215(a) and (e) and we find that Citicasters has failed to raise a substantial and material question of fact regarding whether the proposed modification of the RSM construction permit is in the public interest.

27. Accordingly, IT IS ORDERED, that Sections 73.215 (a) and (e) ARE WAIVED, and the applications of R&S Media to modify its outstanding construction permit and for license to cover (File Nos. BMPH-20000229ABO and BLH-20031229ABR, respectively) ARE GRANTED.

28. IT IS FURTHER ORDERED, that pursuant to Section 316 of the Communications Act of 1934, as amended, and Section 1.87 of the Commission's Rules,³³ the license for Station KCIX(FM) Garden City, Idaho, IS MODIFIED, indirectly, by the grant of the R&S Media application for construction permit, effective thirty days from the release of this *Memorandum Opinion and Order*.

³² *Greater Media supra*. Also, insofar as interference to KCIX(FM) from KBNH(FM) is concerned, we note that under Section 73.318 of the Commission's rules, KBNH(FM) would be required to resolve complaints if interference to KCIX(FM) or other stations which would be received during the first year of operation, and provide effective technical assistance to complainants outside of that contour.

³³ 47 C.F.R. § 1.87.


29. IT IS FURTHER ORDERED, that the July 30, 2004, "Emergency Motion for Summary Reinstatement of CP and Authorization of Immediate Service to Unserved Areas by Fully-Built FM Station" IS DISMISSED.

30. IT IS FURTHER ORDERED, that this *Memorandum Opinion and Order* shall be sent by Certified Mail, Return Receipt Requested to:

Marissa G. Repp, Esq.
Hogan & Hartson, L.L.P.
555 13th Street, N.W.
Washington, DC 20004-1109

Robert Lewis Thompson, Esq.
Smithwick & Belendiuk
Suite 301
5028 Wisconsin Avenue, N.W.
Washington, DC 20016

FEDERAL COMMUNICATIONS COMMISSION



Peter H. Doyle, Chief
Audio Division
Media Bureau